IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Government Appeal No.1669 of 2001
{Old No.1303 of 1990}

Date of decision :-23.08.2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :-23.08.2007 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Government Appeal No.1669 of 2001
{Old No.1303 of 1990}

State .....Appellants

Versus

1. Har Prasad Verma
   S/o Kishan Lal Verma
   Sakin Officers Colony
   Nasig Bari Almora
   Thana Almora
   District Almora
2. Pankaj Pande
   S/o Mohan Chandra Sakil
   Seechai Colony Ramnagar
   District Nainital .....Respondents-accused

Delivery of Judgment : 23rd August, 2007

Mr. G. S. Sandhu Govt. Advocate with Mr. B. S. Parihar Brief Holder for State-Appellant.
Mr. R. S. Sammal Advocate with Mr. D. C. S. Rawat and Mr. Prem Kaushal, Advocates for the respondents.

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble J. C. S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

This Government Appeal has been filed against the judgment & order dated 28.03.1990 passed by Sri I. P. Singh, the then Sessions Judge, Almora in S.T. No.48 of 1989 whereby the respondents-accused Har Prasad Verma and Pankaj Pande were acquitted for the offence of murder under section 302 read with section 34 IPC.

2. Brief facts for disposal of this appeal are that on 10.08.1989 at 8:55am Dhyan Singh PW8 – father of the deceased lodged a written report Ex.ka.2 at police station Someshwar, District Almora that in the intervening night of 09th & 10th August, 1989 some

unknown persons had murdered his two sons namely Nandan Singh and Jagat Singh, after entering into his house situated in Someshwar market. On the basis of written report Ex.ka.2, a case was registered against the unknown persons under section 302 IPC. During the course of investigation, the police took two dead bodies into possession and after having prepared Panchayatnama, photo-lash, challan lash in respect of dead bodies sealed the same and sent them for postmortem examination. The police recovered one jug, one glass and one empty cell of a cartridge. The police also recovered one blood stained knife, one blood stained Angochha and a blood stained Baniyan from the dead body of Nandan Singh. These articles were duly sealed on the spot and recovery memos thereof were prepared by S.I.-J.C. Thapalliyal PW14. Thereafter, the police arrested Har Prasad Verma and Pankaj Pande. The interrogation of accused Har Prasad Verma led to the recovery of one blood stained knife from a spot near Bhramsarover and two note-books, one blood stained shirt and other material from the house of Har Prasad Verma. The interrogation of accused Pankaj Pande led to the recovery of two country-made pistols, three live cartridges and a blood stained shirt from the spot near '*Mohaan*'. The police also took a motorcycle bearing registration No.URB-5523 into his possession from Puran Singh PW7. The recovered weapons along with the empty cell of cartridge recovered at the spot were sent to the Ballistic Expert, Lucknow. Finger prints collected from the jug and the glass recovered from the spot alongwith specimen finger prints of the two accused persons were sent to the Government Finger Print Expert, Lucknow and the two notebooks

recovered from the house of accused Har Prasad Verma alongwith his specimen writing were sent to the Government Handwriting Expert, Lucknow.

3. After submission of chargesheet the respondents-accused were committed to the court of Sessions for trial and the trial court framed charges against the accused persons. They denied the charges levelled against them and claimed their trial.

4. The prosecution in support of its case examined as many as fourteen witnesses, namely, Jaipal Singh PW1 Rajendra Singh PW2, Pan Singh PW3, Puran Singh PW4, Diwan Singh PW5, another Diwan Singh PW6, another Puran Singh PW7, Dhyan Singh PW8, Shyam Singh Bora PW9, Constable Gopal Ram PW10, Umesh Bora PW11, Home guard S.S. Khan PW12, Inspector K. N. Joshi PW13 and S.I. – J.C. Thapaliyal PW14 – I.O.

5. The accused persons were examined u/s 313 Cr.P.C. and they have pleaded not guilty to the offence. They have stated that they have been falsely implicated in this case.

6. The learned trial court on appreciation of the evidence held the respondents-accused not guilty and acquitted them for the charges levelled against them.

7. We have heard learned counsel for the parties and perused the record carefully.

8. It needs to be mentioned here that it is not disputed that deceased Nandan Singh died on account

of injuries sustained by him on the date of occurrence. Dr. H.C.K. Joshi, Medical Officer conducted the postmortem of deceased Nandan Singh on 11.08.1989 at 11:45a.m. and found following ante-mortem injuries on the person of deceased Nandan Singh:-

(i) Elliptical stab wound 1cm x 0.5cm on lower part of right axillary with tale towards posterio lateral aspect.
(ii) Elliptical stab wound 2cm x 0.5cm and anterior lateral side of right side chest, 12cms below right nipple.
(iii) Elliptical stab wound 4cms lateral to injury no.2 measuring 1.5cm x 0.5cm.
(iv) Elliptical stab wound measuring 1cm x 0.5cm, horizontal on neck tailing towards left side.
(v) Elliptical stab wound 3cms below injury no.4 horizontal.
(vi) Elliptical stab wound 3cms x 2cms oblique 5cms below injury no.5.
(vii) Elliptical stab wound horizontal 2cms x 0.5cms, 2cms below injury no.6.
(viii) Elliptical stab wound 3cms x 1.5cm on the right side back of chest, vertical and 5cms lateral to injury no.7.
(ix) Elliptical vertical stab wound on the back right upper side of chest 2.5cms x 1.5cm
(x) Elliptical stab wound 2.5cms x 1.5cm oblique on the back of chest.
(xi) Elliptical horizontal stab wound 2cms x 0.5cm on the upper side back of left chest.
(xii) Vertical elliptical stab wound 1.5cms x 0.5cm on the lateral posterior side of left chest.
(xiii) Stab wound oblique on left side of neck.

Learned counsel for the defence had made an endorsement on the post-mortem report that *"correctness of execution of the papers is admitted."* According to the postmortem report, the death of

deceased might have occurred about 36 hours before postmortem. It was further opined that the death of the deceased was caused due to shock and haemorrhage resulting from the ante-mortem injuries.

9. Deceased Jagat Singh died on account of injuries sustained by him. Dr. H.C.K. Joshi, Medical Officer conducted the postmortem of deceased Jagat Singh on 11.08.1989 at 12:45pm and found following ante-mortem injuries on the person of deceased Jagat Singh:-

(i) Incised horizontal elliptical wound 1.5cm x 0.5cm on the left abdominal wall, 8cms above umbilicus.
(ii) Horizontal elliptical stab wound 2cms x 0.5cm on the left upper part of back.
(iii) Horizontal elliptical stab wound 3cms x 1cm, 3cms below injury no.2.
(iv) Horizontal elliptical stab wound 3 cms x 1.5cm, 5cms lateral to injury no.2.
(v) Vertical elliptical stab wound 3cms x 2cms, on the intra scapular region of right side back.
(vi) Vertical elliptical stab wound 3cms x 0.5cms, 4cms below and lateral to injury no.5.
(vii) Horizontal stab wound elliptical 2cms x 1cm on upper part of right side neck, 3cms below lobule.
(viii) Horizontal stab wound elliptical 3cms x 1.5cm on posterio inferior side of left side neck.

Learned counsel for the defence had made an endorsement on the post-mortem reports that *"correctness of execution of the papers is admitted."* According to the postmortem report, the death might have

occurred about 36 hours before postmortem. It was further opined that the death of the deceased was caused due to shock and haemorrhage resulting from the ante-mortem injuries.

10. Thus, it is amply established that deceased-Nandan Singh and Jagat Singh died on account of injuries sustained by them on the date of occurrence. The relevant date and time of the death of the deceased persons have not been disputed.

11. Before proceeding further, it needs to be mentioned here that we are hearing the appeal filed by the State against the order of acquittal of the accused. It is well settled principle of law that there is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal should not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view taken by the trial court should be accepted. The trial court had an occasion to record the demeanour of the witnesses and also to see the conduct of the witnesses deposing before the court. If two views are possible on the evidence adduced in the case, the view which is favourable to the accused should be adopted. In the case of **Kalyan & others Vs. State of U.P. 2002 SCC**

(Cri) 780, the Hon'ble Apex court has held as follows:-

> "*8. The settled position of law on the powers to be exercised by the High Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witnesses and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In* ***Kali Ram v. State of H.P. 1973 SCC(Cri) 1048*** *this Court observed that the golden thread which runs through the web of administration of justice in a criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Court further observed:*
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> *"27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Allen quoted on p. 157 of 'The Proof of Guilt' by Glanville Williams, 2nd Edn.:*

> *'I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos.'*

> 28. *The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of* ***Shivaji Sahabrao Bobade Vs. State of Maharastra 1973 SCC (Cri) 1033*** *as is clear from the following observations:*

> > '*Certainly it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distinction between "may be" and "must be" is long and divides vague conjectures from sure conclusions.*'"

12. In view of above dictum of the Hon'ble Apex Court, we have to consider whether the respondents-accused were responsible for causing death of the deceased persons or not. There was no eyewitness of the incident and the prosecution case rests upon circumstantial evidence. The law which is fairly settled about circumstantial evidence is that it should be such as to point out only to the guilt of the accused. The evidence should exclude all other hypothesis except the guilt of the accused. It is often said that though witnesses may lie, circumstances will not but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In order to sustain conviction on circumstantial evidence, each of the incriminating piece of circumstantial evidence should be proved by cogent and reliable evidence and

the court should be satisfied that the piece of evidence taken together forge such a chain wherefrom no inference other than the guilt can be drawn.

13. The Hon'ble Apex Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra (AIR 1984 SC 1622)** while dealing with circumstantial evidence, has held that onus is always on the prosecution to prove that the chain is complete. The condition precedent before conviction could be based on circumstantial evidence were enumerated as under :-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The above decision was also followed in the decisions of the Hon'ble Apex Court in **State of Rajasthan Vs. Rajaram 2003 Cri.L.J. p/3901, State of U.P. Vs. Satish 2005 SCC (Cri) 642 and Ram Singh Vs. Sonia & others 2007 (3) SCC 1.**

14. It is pertinent to mention here that respondent no.1-Har Prasad Verma has died during the pendency of this appeal and the appeal against respondent no.1 Har Prasad Verma has already been abated vide order dated 12.02.2007. Therefore, we will analyze the circumstances projected by the prosecution only against the surviving respondent no.2-Pankaj Pande.

15. The first circumstance projected by the prosecution is that respondent no.1 Har Prasad Verma and respondent no.2 Pankaj Pande were friendly with each other. It was further projected by the prosecution that the respondent no.2 borrowed a motorcycle bearing No.URB-5523 from Puran Singh for visiting Someshwar in the night of 09.08.1989. It was further tried to project that Shyam Singh Bora PW9 – a friend of Jagat Singh saw the respondents-accused going with Jagat Singh (deceased) to the newly constructed house at Someshwar. Thereafter, these two accused persons have left for Almora on the motorcycle. In support of this circumstance against the respondents-accused, the prosecution has led the evidence of Puran Singh PW7 – the owner of motorcycle. But, Puran Singh PW7 did not support the prosecution version and he was declared hostile by the prosecution. Puran Singh PW7 had

categorically stated in his evidence that he did not know the respondents-accused and he did not recognize them during the course of the trial. He had further stated that the respondents-accused had never borrowed his motorcycle on the night of 09.08.1989 and he did not give his motorcycle to them. The prosecution has also adduced the evidence of Shyam Singh Bora PW9 to establish the fact that he saw respondents-accused in the company of Jagat Singh deceased at Someshwar market in the night of 09.08.1989 and they alongwith Jagat Singh deceased were going towards the newly constructed house of Jagat Singh deceased. But when this witness came to the witness box, he did not support the prosecution version and as such he was declared hostile by the prosecution. Shyam Singh Bora PW9 has categorically denied in his evidence that he saw Har Prasad Verma and one more coming on a motorcycle from Almora side to Someshwar in the evening of 09.08.1989. He has stated that he returned home on 09.08.1989 at about 8pm and he did not go out of his house thereafter on that night. He has further stated that it was only on the morning that he learnt about the murder of Jagat Singh and Nandan Singh. Thus, these two witnesses i.e. Shyam Singh Bora PW9 and Puran Singh PW7 have not supported the prosecution case. We, therefore, hold that the learned trial court was justified in holding that the circumstance of borrowing a motorcycle from Puran Singh PW7 by the respondents-accused on 09.08.1989 and they were seen in the company of Jagat Singh in the same night is not established. Therefore, we are completely in agreement with the findings recorded by the trial court.

16. The other circumstance projected against the respondents-accused is that they were returning to Almora on the motorcycle the fuel of the motorcycle got exhausted near Bhramsarover and they tackled with Jaipal Singh PW1 and Pan Singh PW3 for obtaining petrol from the taxi bearing No.UMT-9936. When Jaipal Singh PW1 and Pan Singh PW3 did not agree to give petrol for the motorcycle, the respondents-accused called taxi driver Rajendra Singh PW2 from his house. Rajendra Singh PW2 took them to Almora in the aforesaid taxi from Bhramsarover. The respondents-accused left the motorcycle at Bhramsarover in the care of Jaipal Singh PW1 and Pan Singh PW3. In order to prove this circumstance, the prosecution has adduced the evidence of Jaipal Singh PW1, Rajendra Singh PW2 taxi driver and Pan Singh PW3. But, they have not proved the above fact as narrated by the prosecution and they all denied the prosecution version. They were declared hostile by the prosecution. Rajendra Singh PW2 has categorically stated that he never parked his taxi at Bhramsarover and he never allowed Jaipal Singh PW1 and Pan Singh PW2 to sleep therein. Rajendra Singh PW2 has further stated that he did not carry the respondents-accused in the night of 09.08.1989 from Bhramsarovar to Almora. Jaipal Singh PW1 and Pan Singh PW3 have also denied the fact that they were sleeping inside the taxi in the night of 09.09.1989. They have stated that the respondents-accused never met them and they never asked them for providing fuel for the motorcycle. They also denied that the motorcycle was given by the respondents accused in their care. Thus, this

circumstance projected by the prosecution had not been supported by any evidence.

17. The next circumstance projected by the prosecution is that on 10.08.1989 one boy carried a container of 2 litres of petrol to the owner of the motorcycle i.e. Puran Singh PW7. Puran Singh PW7 was informed that his motorcycle was lying near Bhramsarovar on the road side and thereafter he brought his motorcycle from there. This fact has also been denied by Puran Singh PW7 in his evidence. The boy who informed Puran Singh PW7 about his motorcycle standing on the road near Bhramsarovar was not produced before the court and there is no evidence of the above fact on record.

18. It is pertinent to mention here that both the deceased persons had sustained stab injuries on their persons. There was no fire-arm injury on their persons. The another circumstance projected by the prosecution is that Pankaj Pande was interrogated by the police and the recovery of two country-made pistols, three live cartridges and a blood stained shirt was made from a bush near '*Mohaan*' at the instance of accused Pankaj Pande. This recovery was made by J.C. Thapaliyal PW14 (Investigating Officer) in the morning of 02.10.1989. The prosecution has adduced the evidence of J. C. Thapaliyal PW14 and the 'punch' witness Home-guard S.S. Khan PW12. Home-guard S.S. Khan PW12 has stated that he was taken from Ranikhet alongwith the accused to '*Mohaan*' from where the aforesaid articles were recovered at the instance of accused Pankaj Pande and the recovery memo Ex.ka.14 was

prepared. He has categorically stated in his evidence that he did not know accused Pankaj Pande since before and he made signature on the blank papers at the spot and later on he was brought to '*Mohaan*' and thereafter he left them and the memo of recovery was not prepared at the spot. The recovery memo was prepared at '*Mohaan*'. He has deposed that at the place of recovery the I.O. himself dig up and recovered articles. This evidence clearly reveals that the discovery under section 27 of the Evidence Act is not in accordance with law and it is not believable also. Therefore, the learned Sessions Judge has rightly rejected the testimony of the punch witness of the recovered articles. Therefore, the evidence of recovery witness makes the recovery doubtful. The trial court has elaborately discussed this aspect and has rightly disbelieved the prosecution version. Even if the discovery as pointed out by the prosecution is believed, it cannot be the sole base for conviction of the accused. There must have been other prosecution evidence against the guilt of the accused. It is also pertinent to mention here that there is no fire-arm injuries on the person of the deceased. If there is no other prosecution evidence against the guilt of the accused, the evidence of recovered articles by themselves would not take the prosecution case any further. In the case of **State of M.P. Vs. Kriparam 2005 SCC (Cri) 830,** the appellant and two others were charged under section 302/34 IPC for committing the murder. The prosecution alleged that three accused persons attacked the deceased with deadly weapons and the deceased died instantaneously. During the course of investigation, the prosecution alleged that it recovered

blood-stained clothes worn by the accused as also blood-stained axe which was used in attacking the deceased. The trial court convicted all three accused persons under section 302/34 IPC. In appeal, the High Court on re-appreciation of the evidence came to the conclusion that the prosecution has failed to establish the case against the accused, hence acquitted the accused. When the matter came before the Hon'ble Apex Court, it has been held that there were two eyewitnesses of the incident and they were found unreliable. The prosecution also led the evidence of the recoveries allegedly made at the instance of the accused. The Hon'ble Apex Court has held as follows:-

> "*10. Similar is the case in regard to recovery of an axe. In regard to this, witnesses for the recovery say, they found a small stain of blood on it. The serologist in regard to this blood also states that it is not possible to find out the origin of the same. Therefore, even this recovery would not in any manner help the prosecution in this case. Even otherwise, if the prosecution case in regard to PWs 1 and 3 is not acceptable then these recoveries by themselves would not take the prosecution case any further.*"

19. The next circumstance projected by the prosecution against accused Pankaj Pande is that Pankaj Pande was missing from the office. The I.O. has stated in his evidence that he was employed in the office of Assistant Engineer, Anusandhan and Niyojan Khand, Almora. On being enquired from Assistant Engineer, it was informed that Pankaj Pande had not been joining his duties since 10.08.1989. The Assistant Engineer has given a certificate to that effect on 28.08.1989 to the I.O. vide Ex.ka.37. The I.O. has taken the process under section 82 & 83 Cr.P.C. against accused Pankaj Pande and that was executed against him. Respondent no.2 Pankaj Pande

surrendered before the Chief Judicial Magistrate on 18.09.1989. It is established that accused Pankaj Pande was not traceable and remained absconding after commission of the offence. It is definitely a circumstance which goes against Pankaj Pande. It is also an important link to take an inference that he has committed the offence. It there is no other circumstance against him mere absconding cannot be a ground to convict the accused. As we have noticed earlier that the only circumstance of recovery of two country-made pistols, three live cartridges and blood stained shirt was projected by the prosecution and the evidence was led to that effect, but the evidence was not found credible and cogent. In view of the above, mere absconding cannot be the sole basis of conviction of the accused. We are fortified in our view by the dictum of Hon'ble Supreme Court in **State of M.P. Vs. Paltan Mallah & others 2005 SCC (Cri) 674** which is as under:-

> "*17. The fact that some of these accused had absconded from the place of their business at the relevant time is also pointed out by the counsel for the appellant as an incriminating circumstance. When the murder of a trade union leader took place, there were strong allegations that the industrialists in the area had been instrumental in causing his death. Under those circumstances, if any of these accused had absconded from the place, it could not be said to be a factor to prove their guilt.*"

20. After perusal of the entire evidence and the circumstances projected by the prosecution, we are of the view that the prosecution could not establish the case against the respondents. It is true that the conviction can be based solely on the circumstantial

evidence but it should be tested on the touch stone of law relating to circumstantial evidence. The circumstantial evidence must be as such which the conclusion of the guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. When the evidence on record is analyzed in the background of the principles highlighted above, the inevitable conclusion is that the circumstances projected by the prosecution against respondents are not consistent with the hypothesis of the guilt of the accused.

21. In view of the foregoing discussion, we are completely in agreement with the findings recorded by the trial court. We are of the considered view that the trial court has rightly acquitted the respondents-accused. Therefore, we hold that the prosecution has not established the guilt beyond reasonable doubt against the respondents-accused and there is no infirmity in the judgment passed by the trial court.

22. Hence, the appeal is dismissed and the order of acquittal passed by the trial court against the respondents-accused is confirmed.

23. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within two months.

(J.C.S. Rawat, J.) **(Rajeev Gupta, C.J.)**

Dated 23rd August, 2007

LSR